UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 623

Case No. 670: MILLER

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Bernard Miller, a staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), the President of the Tribunal, with the agreement of the Respondent, extended to 15 May 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 13 May 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"11. (a) to find that ... the decision of the ICAO Director of Administration, ..., to issue a reprimand to be placed on his personal file on 6 December 1990;

...

iii. was tainted with abuse of authority and was discriminatory...

(b) to order the Respondent to have the reprimand removed from the Applicant's personal file.

...

12. ...

(b) to order the Respondent to take appropriate disciplinary measures against the Director of Administration in connection with his issuing of a recommendation of illegal action;

...

(d) to determine an amount of compensation to be paid to the Applicant for the injury sustained by him.

...

15. (a) to find that the decisions of the Respondent:

i. to approve retroactively in September 1991, the withholding of the Applicant's annual increment, due on 2 January 1991 and to delay the increment date to 2 July 1991, a procedure governed by ICAO staff rule 103.2 and staff regulation 3.2 was unfounded in fact and in law, and

...

(b) to order the Respondent to rescind his decision to withhold the Applicant's increment;

(c) to order the Respondent to reinstate the increment with interest up to the time of reinstatement, and

(d) to determine compensation to be paid for the injury sustained by the Applicant.

..."

Whereas the Respondent filed his answer on 30 November 1992;

Whereas the Applicant filed written observations on 25 January 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 2 January 1990, on a fixed-term appointment at the P-3 level, as a Language Officer (Interpreter/Translator). He was assigned to the Interpretation Section, Language and Publications Branch (LPB) of the Bureau of Administration and Services (ADB). The letter of appointment provided that the "appointment ... shall include a probationary period of one year during which, if the Secretary General is not satisfied with your services, the appointment may be terminated by one month's notice or salary in lieu thereof...". On 1 November 1990, the Chief, LPB, and the Director, ADB, recommended that the Applicant's probationary period be considered as satisfactorily completed.

According to the record, at a meeting of the Governing Council held on 5 December 1990, the President of the Council informed delegations that the meeting would be suspended on account of "a little technical problem". The Applicant, however, did not leave his booth, but stood up, "connected [his] microphone and said: 'The interpreters apologize, we do not have a little technical problem we have a major air problem'" after which he "violently threw [his] speaker and earphones on [his] table and left the booth, an action which most Representatives on the Council saw."

In a memorandum dated 6 December 1990, the Director, ADB, informed the Applicant as follows:

> "4. ...You will no doubt realize the seriousness of your misconduct as your function in a meeting of the Governing Body of the Organization is to interpret what the speaker has said and not to add, rectify or clarify what he has said. In this particular instance there was no need for interpretation since the President of the Council had expressed himself in English.
>
> 5. Consequently, in accordance with staff rule 110.1, paragraph 3, I am issuing to you this written reprimand which will be placed in your file.
>
> 6. Furthermore, in view of the seriousness of the misconduct and notwithstanding the satisfactory

> performance of your assigned duties, I have decided to recommend to the Secretary General that your probationary period be extended for a period of six months since I cannot under regulation 4.11 certify that I am satisfied with your services."

In a letter dated 21 December 1990, the Chief of the Personnel Branch, informed the Applicant that the Secretary General had approved the Director, ADB's, recommendation concerning the extension of the Applicant's probationary period of service. Consequently, it was extended until 30 June 1991. On 2 January 1991, the Applicant asked the Secretary General to review this decision.

In a further exchange of correspondence between the parties, the Applicant expressed regret that he was made so ill by the conditions in the interpreters' booth that he acted in a manner which might have caused offence. On 18 January 1991, the Applicant again requested the Secretary General to review the decision contained in the letter of 21 December 1990. The Applicant reiterated that the action to extend his probationary period of service did not fall within any of the provisions of the ICAO Staff Regulations, and that its duration was governed by the terms of his contract of employment, which could not be changed unilaterally.

On 13 February 1991, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). The Board adopted its report on 21 June 1991. Its conclusions read as follows:

> "91. Taking account of the submissions made and the evidence presented, the Board considers that the Organization's decision to extend the Appellant's probationary period was unfounded in fact and in law and unanimously recommends that the extension be rescinded and the Appellant's probationary period be considered as having ended on 1 January 1991.
>
> 92. The Board rejects the other contentions of the Appellant and makes no further recommendations with regard to this case."

On 9 July 1991, the Secretary of the AJAB transmitted to the Applicant a copy of the AJAB's report and informed him of the Secretary General's decision on the report. The Secretary General's decision, dated 8 July 1991, reads as follows: "I accept the Board's recommendation. Consequently, the probationary period of Mr. Miller is considered to have been completed on 1 January 1991."

In a memorandum dated 20 August 1991, the Director, ADB, recommended to the Secretary General, that the step increase which would have normally become due on 2 January 1991, "be delayed and granted to [the Applicant] with effect from 2 July 1991". The Director, ADB, argued, in support of his recommendation, that it would not "be equitable" to grant a step increase in light of the written reprimand of 6 December 1991. Accordingly, on 19 September 1991, the Secretary General informed the Applicant as follows:

> "... following the written reprimand issued to you by [the Director]/ADB on 6 December 1990, I have decided that your step increase which would have normally become due on 2 January 1991, would be delayed and would instead be granted as from 2 July 1991."

On 8 October 1991, the Applicant requested the Secretary General to review this decision, and in the absence of a positive response, sought the Secretary General's agreement to submit his appeal on this matter, directly to the United Nations Administrative Tribunal. In a letter dated 28 October 1991, the Secretary General informed the Applicant that he would maintain the decision and granted his consent to direct submission of the appeal on this question, to the Tribunal.

On 13 May 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent did not resort to informal methods of drawing attention to disciplinary problems as required by staff rule 110.13.

2. The Respondent was aware of the existence of serious and persistent cases of illness related to the ICAO building, particularly affecting the interpreting booths, reported extensively since 1978 and including those occurring in the week of 3 December 1990.

3. The contested decisions are tainted with abuse of authority and were unfounded in fact and in law and should be removed from the Applicant's file.

Whereas the Respondent's principal contention is:

The decisions to issue a written reprimand to be placed on the Applicant's personnel file and to delay the step increase of the Applicant until 2 July 1991, constituted a proper exercise of the Respondent's authority and not an abuse of power.

The Tribunal, having deliberated from 29 October to 12 November 1993, now pronounces the following judgement:

I. The Applicant has asked for expert evidence, witnesses and oral proceedings. The Tribunal considers that the material before it is adequate and additional details of events are not necessary for a decision. Therefore, the request for hearing of witnesses is denied.

II. In substance, the Applicant appeals against the decisions to issue a written reprimand and to delay his salary increment.

III. The Applicant also questions the legality of the recommendation by the Director of the Bureau of Administration and Services to the Secretary-General, which led to the decision to extend the Applicant's probationary period of service beyond 1 January 1991.

The Tribunal notes that on 8 July 1991, the Respondent accepted the recommendation of the Advisory Joint Appeals Board (AJAB) that the extension of the Applicant's probationary period be

rescinded and considered as having ended on 1 January 1991. The Tribunal considers, therefore, that this issue has been resolved.

IV. The Tribunal notes that, following the incident which took place in the ICAO Council Chamber on 5 December 1990, the Director of the Bureau of Administration and Services issued, on 6 December 1990, a written reprimand to be placed on the Applicant's file.

The ICAO Staff Rules provide in staff rule 110.1 for disciplinary measures arising out of the unsatisfactory conduct of a staff member. Paragraph 3 of staff rule 110.1 states inter alia that "Officials responsible for the supervision of staff ... may issue written warnings or reprimands, which will not be regarded as formal disciplinary actions..."

V. In the present case, the Tribunal observes that most of the grounds invoked by the Applicant on the question of the decision to issue a written reprimand were carefully examined by the AJAB which reported that "the Board is not convinced that the decision to issue the reprimand was improperly taken." The Tribunal endorses this finding and considers that the action taken by the Director of the Bureau of Administration and Services in issuing a written reprimand was in full compliance with the authority vested in him, in accordance with staff rule 110.1, paragraph 3.

VI. The Applicant further argues that the decisions of the Respondent to approve retroactively, in September 1991, the withholding of the Applicant's annual salary increment, due on 2 January 1991, and to delay the increment date to 2 July 1991, were unfounded, in fact and in law. The Applicant, therefore, asks for the rescission of those decisions, for the reinstatement of the increment with interest up to the time of reinstatement, as well as for compensation for the injury sustained.

VII. In this respect, the Tribunal finds that, in granting an annual salary increment, the Secretary General of ICAO has

discretionary powers based on staff rule 103.2, paragraph 3. The Tribunal cannot review the contested decisions, unless they were tainted by improper motives or other extraneous factors.

VIII. Taking into account all the circumstances, the Tribunal holds that the contested decisions were taken after careful consideration. They constitute a valid exercise of the Secretary General's discretionary authority in the matter, in conformity with the applicable procedures.

IX. Nevertheless, the Tribunal cannot overlook the fact that the Applicant was not informed of the withholding of the increment until nine months after it had been implemented and had no opportunity to make representations or seek redress through regular channels.

The Respondent himself acknowledges that "having received the recommendation from the Director of the Bureau of Administration and Services to delay the increment, he elected not to delay his decision unnecessarily and therefore did not request the Applicant to submit anew his presentation on the case according to the provisions of staff rule 103.2, paragraph 3" (emphasis added).

X. In the Tribunal's view, while the decision by the Respondent dated 19 September 1991, to delay the step increase of the Applicant until 2 July 1991, was a proper exercise of his authority and did not constitute an abuse of power, the decision not to request the Applicant to submit anew his presentations, amounts to a procedural irregularity for which the Applicant is entitled to some monetary compensation.

XI. The Applicant has also requested the Tribunal to adjudge and clarify some aspects of a general legal and practical nature concerning health problems, the institution of safeguards for the protection of rights of staff members and of appropriate disci-

plinary procedures against some ICAO officials. The Tribunal sees no need to deal with such questions which are outside its competence.

XII. For the foregoing reasons, the Tribunal orders the Respondent:

(a) to pay to the Applicant compensation of US$1,500.00 for the injury sustained as a result of procedural irregularities; and

(b) to incorporate a copy of this judgement in the Applicant's personnel files;

(c) all other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Francis SPAIN
Member

New York, 12 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary